SUPREME COURT, U. S
FILED
APR 1

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1459

ROBERT M. MAHONEY, JOYCE B. MAHONEY, MICHAEL MAHONEY, PATRICK MAHONEY and JEFFREY MAHONEY, d/b/a BORMON INVESTMENT COMPANY, AMERICAN LAUNDRY COMPANY, and COLONIAL LINEN SERVICE,

Petitioners,

vs.

LAUNDRY, DRY CLEANING AND DYE HOUSE WORKERS INTERNATIONAL UNION, LOCAL 93 OF SPRINGFIELD, MISSOURI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioners, Robert M. Mahoney et al. (hereafter called "Employers"), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit *en banc* in this case.

OPINIONS BELOW

The opinion of the court of appeals *en banc* (App. A, infra, pp. A1-A24) is reported at ..... F.2d ....., 85 LRRM 2880. The earlier opinion by a three judge panel of the court of appeals (App. E, infra, pp. A28-A38) is reported at ..... F.2d ....., 84 LRRM 2084. The decision of the District Court for the Western District of Missouri (App. F, infra, pp A39-A47) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 22, 1974 (App. B, infra, p. A25), and Employer's timely petition for rehearing en banc was denied on February 13, 1974 (App. C, infra, p. A26). This petition for certiorari is filed within ninety (90) days of the latter date, and within thirty (30) days of the order of March 6, 1974, in which the court of appeals stayed the issuance of mandate (App. D, infra, p. A27). Original jurisdiction in the District Court was invoked under 29 U.S.C. § 185(a) and 28 U.S.C. § 1337. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Where a Union and Employer under their collective bargaining agreement have reopened wage rates and seniority provisions "for negotiation" in the middle of the contract term and while the no strike clause is in effect, whether federal policy under 29 U.S.C. § 158(d) requires those parties to negotiate in good faith for any changes in such reopened provisions without any official compulsion, or whether the Union may refuse to negotiate and

instead insist on arbitration of the new wage rates and seniority provisions in reliance on the arbitration clause of the agreement under which the parties have agreed to arbitrate "grievances" claiming contract violations?

2. In determining questions of substantive arbitrability, is it the proper role of federal courts to order an employer to arbitrate a dispute over reopened wage rates during the middle of the contract where the Employer has expressly agreed to arbitrate only "grievances" and none exists and where the contract of the parties has expressly stated that the wage rates are to be reopened only "for negotiation"? Is it proper for federal courts to *infer* an agreement to arbitrate on normally negotiable issues which the parties have expressly agreed to "negotiate", or should the presumption of arbitrability apply only to "grievances" which the parties have expressly included as the type of issues they agree to arbitrate?

3. Is it proper for federal courts to create obligations to arbitrate new wage rates and contract provisions (which the Union and Employer have reopened "for negotiation") by use of a presumption that any dispute is arbitrable (even disputes not involving a claim of contract violation) where the Union has waived its right to strike with respect to that dispute by an absolute no-strike clause?

4. Where the arbitration clause of a collective bargaining agreement expressly provides that the arbitrator "shall not have the power to add to, subtract from, or change the terms of the agreement," is it proper for a Union to obtain an order that the Employer appear before an arbitrator for the purpose of having the arbitrator impose new wage rates and contract provisions on the parties? Does such clause limiting the arbitrator's "power" establish that the Union's claim is an issue that

is not arbitrable as beyond the jurisdiction or authority of the arbitrator, as the Employers claim, or must the Employers be ordered to go to arbitration on the Union's claim and then to reapply to the Court to set the Arbitrator's decision aside later if he exceeds the contractual limitations on his powers?

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. §§ 151 et seq.) are as follows:

> *Sec. 8 (b) (1) (B).* "It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce * * * (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances".
>
> *Sec. 8 (d).* "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, * * * but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *".
>
> *Sec. 203 (d).* "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. * * *"

Sec. 301 (a). "Suits for violation of contracts between an employer and a labor organization representing employees * * * may be brought in any district court of the United States having jurisdiction of the parties * * *".

STATEMENT OF THE CASE

In 1971 both the Employer and Union were bound by a contract which was to expire on August 8, 1973.[1] Both parties gave timely notice to reopen the subject of wages and seniority in 1971, under Section 2 of Article XX (A. 30)[2] of that agreement, which provides:

> "Section 2. Either the Employer or the Union shall have the right as of August 8, 1971, to reopen *for negotiation* on the subject of wages and seniority only, upon either party giving written notice sixty (60) days prior to such reopening date. * * *" (Emphasis added)

On January 10, 1972, while negotiations were still in progress and without any impasse having been reached (A. 44)[3] the Union instituted a Complaint in the District

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1. All relevant terms of the contract are set out in the *en banc* opinion of the Eighth Circuit (App. A, infra, pp. A2-A5), and therefore will not be set out here except where repetition is deemed necessary.

2. Reference to "A." followed by numbers are to the page numbers of the Joint Appendix which was printed for use in the Eighth Circuit and which has been made a part of the certified record which has been transmitted by the Clerk of that Court.

3. Since the District Court's judgment which was affirmed by the divided opinion of the Eighth Circuit, which we seek to have reviewed, was rendered under a summary judgment motion of the Union, the factual assertions made in the affidavits filed by the Employers with the District Court must be deemed to be true for the purposes of this case. *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 468, 473 (1962). All doubts as to factual disputes must be resolved in favor of the Employers who opposed the Union's motion for summary judgment.

Court seeking to compel the Employers to submit to binding arbitration the reopened issues. Thereafter the Union refused to further negotiate these issues.

The Employers' motion to dismiss or for summary judgment, supported by an affidavit showing that no grievance existed which was subject to arbitration and that the Employers desired to further negotiate the issues, and that the Employers had made proposals to which the Union had not even responded and Employers were willing to make further proposals more favorable to the Union (A. 42-45, 50-54), was overruled by the District Court's order of September 11, 1972 (A. 58-66, App. F, infra, pp. A39-A47), which granted summary judgment to the Union ordering the Employers to submit the reopened issues to binding arbitration.

After quoting the contract provisions which the District Court found pertinent (A. 59-60) (omitting any reference to Sections 1 through 4 of the Grievance and Arbitration Article, A. 20-21, which define "grievance" and outline the steps which the parties have agreed are conditions precedent to any obligation to arbitrate such grievances), the District Court held that federal policy favors the arbitration of disputes, that the failure of the parties to reach an agreement on the negotiable wage and seniority provisions constituted a "dispute" and that therefore the parties must arbitrate this dispute, particularly because the District Court found that arbitration is the *quid pro quo* for the no-strike and no lockout clause (A. 20). The District Court relied, not on the Arbitration clause of the agreement for its holding that all non-strikeable "disputes" must be arbitrated, but on the "Purpose" clause (A. 10) set out in the preamble to the agreement. The District Court held that the arbitrator must be permitted to set new wage rates and write into the agreement new senior-

ity provisions, despite the provisions of Section 5 of the Arbitration Article (A. 21-22) which provides that the arbitrator "shall not have the power to add to, subtract from, or change the terms of the contract" (on which Employers relied) on the theory that once these subjects were reopened for negotiation they were no longer a part of the agreement. The District Court did not explain how the arbitrator could add new provisions on those subjects to the agreement, without exceeding the quoted prohibition in Section 5 of the Arbitration Article. The District Court found an obligation to arbitrate "disputes" and ignored the fact that the Grievance and Arbitration Article (A. 20-22) expressed an agreement to only arbitrate written *grievances* claiming contract violations, and makes no reference to "disputes". The District Court thus purported to authorize the arbitrator to re-write the wage and seniority provisions of the agreement, and to ignore the contractual agreement of the parties which expressly stated he "shall not have" that "power."

After a two to one decision by a panel of the Eighth Circuit in favor of affirming the District Court's judgment (App. E, infra, pp. A28-A38), the case was heard *en banc* by the full eight judge panel of the Eighth Circuit United States Court of Appeals. That resulted in an equally divided (four to four) decision by the Eighth Circuit (App. A, infra, pp. A1-A24) which affirmed the District Court's judgment ordering arbitration.

Judge Heaney authored the majority opinion for the three judge panel of the Eighth Circuit (App. E, infra), and also the subsequent opinion for the four judges who favored affirmance in the *en banc* decision for the Eighth Circuit (App. A, infra). His first opinion of August 16, 1973 stated that the termination clause of the agreement "does not expressly require the parties to submit disputes

arising out of the negotiations to arbitration". That opinion also recognized that the Grievance and Arbitration Article "directs its attention to a three-step procedure for the adjustment of employee *grievances* and does not specifically state that it is intended to resolve *disputes*" other than grievances (Emphasis added). But his subsequent opinion omits these comments. Both of the opinions by Judge Heaney approved the District Court's ordering of arbitration of "disputes" based on the preamble "Purpose" clause of the agreement, rather than what was contained in the Arbitration clause. Judge Heaney's opinions also found that the prohibition of power to the arbitrator to add to, subtract from, or change the agreement were inapplicable, thus approving the District Court's disregard of that portion of the Arbitration clause for a different reason than given by the District Court.

Judge Ross authored the dissenting opinion to the decision of the three judge panel (App. E, infra) and the decision of the four judges on the *en banc* panel who advocated outright reversal of the District Court's decision (App. A, infra). He concludes that a reading of the contract as a whole shows that at the time it was negotiated it was not intended by either party to provide for arbitration of wage disputes arising out of the reopener clause. Although the parties agreed in the "purpose" clause that they intended to provide "procedures" for settlement of "disputes", Judge Ross finds that the procedure agreed upon for settlement of disputes arising from the reopener clause was "negotiation". He further finds that the Grievance and Arbitration clause shows that it is a *narrow* one, limited in its scope to "grievances" claiming contract violations. He points out that the "grievances" are to be handled by the Union Steward, not by a Union Bargaining Committee which handles the reopened negotiations. He concludes that the Employers did not in fact

agree to arbitrate provisions reopened under the reopener clause "for negotiation", but that even if that had not been clear from the agreement, Section 5 of the Arbitration clause made plain that the parties had clearly excluded such issues from the arbitration agreement by its provisions that the "arbitrator shall not have the power to add to, subtract from, or change the terms of the contract." At Footnote 1 of his opinion for the Court *en banc* Judge Ross cites a Decision of the Ninth Circuit which he finds in conflict with the District Court's decision on the effect of the provision in Section 5 of the present arbitration clause prohibiting the arbitrator from writing new terms in the agreement. Judge Ross's opinion discusses at length the previous Supreme Court decisions on questions of arbitrability and states that in no previous case has a court decided the precise issues involved in this case. His opinion states the view that the present agreement is distinguishable on four grounds[4] from the Supreme Court cases where arbitration was ordered, and that the present parties clearly have not contractually agreed to arbitrate wage rates which are historically matters of bargaining and not subjects for arbitration.

Judge Webster wrote a separate decision stating his concurrence with the Heaney opinion, and clarifying his view as to why he concluded that the Employers should be ordered to appear before an arbitrator in this case (App. A, infra). His opinion deals mainly with the Section 5 provisions which prohibit the arbitrator from re-writing the agreement of the parties, a provision which he states is not dealt with in the opinion by Judge Heaney and which Judge Ross found of critical importance. Judge Webster states that he is not prepared to assume that

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4. See App. A, infra, pp. A13-A24, ... F.2d at pp. .....; 85 LRRM at pp. 2286-2287.

the arbitrator will abuse or exceed his power under the agreement by re-writing the contract or adding new provisions to it. He concludes that the arbitrator may not necessarily grant the relief requested by the Union, of imposing new contract terms on the Employers, but that he might instead (a) order the parties to resume bargaining, or (b) hold that he is without power to grant certain relief requested by the Union. Judge Webster states that if the arbitrator were to exceed the limitations of his powers contained in the agreement of the parties, then the Employers could reapply to the District Court for an order to vacate the arbitrator's decision on that ground.

Despite the views expressed in his separate concurring opinion, Judge Webster's concurrence in Judge Heaney's opinion caused the Eighth Circuit to reach an equally divided (four to four) decision which resulted in affirmance of the District Court's summary judgment ordering arbitration of the reopened issues. Judge Ross, Chief Judge Mehaffy and Judges Gibson and Stephenson expressed the view that the District Court's judgment should be reversed outright. Judges Heaney, Bright and Lay expressed the view that the District Court was correct in ordering the Employers to arbitrate the reopened issues, without regard to the limitations on the arbitrator's powers in Section 5 of the arbitration clause. Judge Webster concurred with Judges Heaney, Bright and Lay, on the view that the Employers should be compelled to appear before the arbitrator, but stated the view that the arbitrator still could not exceed the powers as limited in Section 5 of the arbitration clause, concluding that the arbitrator could order the Employers to resume the negotiations which the Employers have been insisting on all along, or could rule that the Employers' position was correct that the arbitrator has no power to grant the relief requested by the Union. Judge Webster also indicated that

the arbitrator might rule that the absolute no-strike clause is inapplicable and allow the Union to strike, but did not say how the arbitrator could so rule without violating the Section 5 prohibition that he shall not subtract terms from the agreement.

REASONS FOR GRANTING THE WRIT

The judgment below, in ordering the Employers to submit midcontract issues of wages and seniority which were reopened "for negotiation" represents the first reported federal court decision which has ordered an employer to submit such issues to binding arbitration.[5] The judgment results from a misapplication of the Supreme Court's decisions on the role of federal district courts in determining questions of arbitrability. The District Court's judgment has been affirmed by an equally divided decision of the United States Court of Appeals for the Eighth Circuit *en banc*, with three judges apparently in favor of the District Court's theory, four in favor of outright reversal and Judge Webster's separate opinion in which he concurred in the opinion for affirmance but indicated a view that any arbitrator's decision could be the subject of further court review if the arbitrator exceeds his authority.

The District Court's judgment in this case (which has become law as a result of the equally divided decision of the Eighth Circuit *en banc*) is of highly questionable propriety. The strong division of the Eighth Circuit *en banc* demonstrates the importance of the questions presented, and the necessity for this Court to review these questions and render a decision which will clarify the role of federal courts in determining questions of arbitrability in cases

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5. See discussion by Judge Ross (App. A, infra, pp. A21-A24), ... F.2d at ....., 85 LRRM at 2287 (at Note 4 of his opinion).

involving issues reopened for negotiations in the middle of a contract containing a no-strike clause, especially in cases like this where the arbitration article provides for arbitration only of "grievances" claiming contract violations and where no grievance exists and no contract violation has been alleged.

The judgment below represents a threat to the continued inclusion by Employers of arbitration clauses in collective bargaining agreements. If Employers cannot be assured that they will not be ordered to appear before arbitrators every time the Union claims a dispute over which the Union cannot strike, it may be too burdensome for Employers in the future to agree to any arbitration clause at all. This, of course, would result in the demise of arbitration of the type that is encouraged by federal policy. 29 U.S.C. § 173(d). That policy favors arbitration only when that method has been "agreed upon by the parties" for the settlement of "grievance disputes" arising "over the interpretation or application" of existing collective bargaining agreements.[6]

The judgment below represents a serious threat to the continued vitality of labor arbitration agreements for settlement of "grievances" claiming contract violations, since the lower courts have *inferred* (despite the admitted absence of any express agreement between the parties to arbitrate such disputes) that the inclusion of the grievance-arbitration clause must necessarily be construed as an agreement to arbitrate disputes-other-than-grievances over matters which have been historically negotiable and which the parties have agreed in their contract to reopen

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6. This Court has recognized that "Every grievance in a sense involves a claim that management has violated some provision of the agreement." *Steelworkers* v. *Warrior and Gulf Navigation Co.*, 363 U.S. 574, 584 (1960).

in the middle of the contract *"for negotiation"*. The judgment below violates the command of Section 8(b)(1)(B) of the N.L.R.A., 29 U.S.C. § 158(b)(1)(B), that an Employer shall not be coerced in the selection of his bargaining agent,[7] and violates the command of Congress in Section 8(d) of the N.L.R.A., 29 U.S.C. § 158(d), that substantive contract terms shall not be imposed on the parties to the bargaining process by official compulsion. See *NLRB* v. *Burns International Security Service*, 406 U.S. 297 (1972); *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970); S. Rep. No. 573, 74th Cong., 1st Sess. 12 (1935).

The judgment below demonstrates the existence of confusion among the Courts throughout the United States as to their role in determining what issues the parties to collective bargaining agreements have agreed to submit to binding arbitration. The Supreme Court's earlier opinions have indicated that it is the duty of the Courts (not the province of arbitrators) to determine the question of substantive arbitrability. *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 546-547 (1964); *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 241 (1962); *Steelworkers* v. *Warrior & Gulf Navigation Co.*, supra. While the lower courts in this case, and in other cases cited in the opinions on which we seek review, have recognized this duty as an abstract principle of law, those courts have demonstrated a confusion as to how this duty is to be fulfilled in the context of a particular contract and a particular issue which a party claims a right to have arbitrated.

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7. The District Court's summary judgment ordering arbitration which has been affirmed below, itself coerces the Employers in this case at the Union's request as to the selection of their bargaining agent, since the judgment orders the Employers to permit an arbitrator to determine the negotiable issues in this case by an arbitral decree.

The Supreme Court's decisions cited above have held that in order to determine the question of substantive arbitrability it is the role of the federal courts to isolate the particular issue which a party seeks to arbitrate and to enter a judgment as to whether that "particular issue" is or is not arbitrable. But the lower courts have overlooked the scope of their role, and have developed an unwarranted presumption of an agreement to arbitrate *any issue* where *any* arbitration clause exists. This results from their confusion over the different principle enunciated in the Supreme Court cases, where the Court has held that once there is found an express agreement to arbitrate a particular issue, then the burden shifts to the party opposing arbitration to demonstrate that the issue (while falling within the subject matter that is covered by the arbitration agreement), has been specifically excluded from the jurisdiction or power of the arbitrator under the agreement by some other provision.

In confusing these two separate principles which have been announced by the Supreme Court, the lower courts have shifted the entire burden on the party opposing arbitration to show that no agreement to arbitrate the particular issue exists (which burden has always been left on the Plaintiff who seeks to compel arbitration by previous Supreme Court decisions). The judgment below represents the most extreme application yet made by a court of the presumption rule so as to *create by inference* an obligation to arbitrate an issue which the parties have not expressly agreed to arbitrate, since the issue here is one the parties did expressly agree to "negotiate" and since Section 8(d) of the N.L.R.A. reveals that on subjects of negotiation there shall be no compulsion as the judgment below seeks to impose.

The Supreme Court cases hold that where an agreement is found to exist whereby the parties have agreed to arbitrate a particular grievance issue, then a party opposing arbitration cannot defeat that contractual obligation by *inference*. Where the parties had agreed to arbitrate "any disputes, misunderstandings, differences or grievances", the Union's request for arbitration of a *grievance* claiming his reemployment rights under the contract had been *violated* cannot prevent arbitration by *inferring* that the management rights clause excludes such grievance from the arbitrator's power. *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960). Where the parties have agreed to arbitrate "differences * * * as to the meaning and application of the provisions of this Agreement" and the Union claims a right to arbitrate a *grievance* claiming that the Employer had infringed on job rights by unlawful subcontracting out of work, the Employer cannot *infer* that it is not obligated to arbitrate such claim of contract violation by reliance on a management rights clause excluding from arbitration "matters which are strictly a function of management". *Steelworkers* v. *Warrior & Gulf Navigation Co.*, supra. In those cases the Court held that where the agreement to arbitrate was broad enough to cover the issue in question the Employer who opposed arbitration of such issue may not be excused by an exclusion clause which is vague.

But the lower courts have overlooked the fact that the Supreme Court has stated earlier in its opinions that "the judicial inquiry under § 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or agreed to give the arbitrator power to make the award he made." *Steelworkers* v. *Warrior and Gulf Navigation Co.*, supra at 582, 584-585. If the agreement does not give the arbitrator that jurisdic-

tion or power, then obviously the Court's function is fulfilled by denying arbitration, but the lower courts have *inferred* agreements to arbitrate in cases like this one where the parties admittedly have not expressly agreed to arbitrate "disputes" other than grievances and where admittedly no grievance exists, and there is no claim of any contract violation.

Under the tests employed by the lower courts in this case, collective bargaining agreements cease to have any meaning or stability. No matter what the contract provides as to wages or on other subjects, if the Union expresses a dissatisfaction with the agreement, the Union can claim a "dispute" exists (even though it does not claim the Employer has violated any provision of the agreement). If a dispute exists, and if the Union cannot strike to resolve the dispute, the lower courts would apparently rule that *ipso facto* the dispute is arbitrable if there is any arbitration clause at all (even if it is limited to agreeing to arbitrate "grievances" and none exists, and even if the arbitrator, as here, is prohibited from adding to, subtracting from, or changing the agreement). Since almost every contract provides that negotiations for new contract provisions may commence during the last 60 days of the existing contract, it would seem to follow that once those negotiations had commenced if no agreement was reached after a few meetings (and even before an impasse is reached, as was the case here), the Union could claim a right to have an arbitrator establish the new contract's terms and provisions, so long as the Union demands arbitration before the contract expires and while it cannot strike over the negotiation dispute. That would certainly be a result which is in direct conflict with the federal policy of free collective bargaining, as commanded by Section 8(d) of the N.L.R.A., but that absurd result would be no more in conflict with that policy than is the result reached below.

The judgment below is in conflict with the decisions of this Court in the foregoing respects, as well as with the Decisions of other Circuits. See the following cases where the Courts held that where a party seeking arbitration seeks to have the arbitrator violate the prohibition that he not seek to add to, subtract from, or change the agreement, the issue is obviously not one which the parties have agreed to submit to arbitration. *West Coast Telephone Co.* v. *IBEW Local 77*, 431 F.2d 1219 (9th Cir. 1970) (employer's attempt to require union to arbitrate question of whether wage rates set forth in contract accurately reflected amounts agreed upon was held outside arbitrator's power, and thus non-arbitrable); *RCA* v. *Association of Scientists*, 414 F.2d 893 (3rd Cir. 1969) (affirming District Court's decision that dispute over "whether or not a new collective bargaining agreement contains terms covering layoff procedure" was not arbitrable in view of arbitration clauses prohibition against adding to, subtracting from, or changing terms of agreement); *Federal Labor Union* v. *Midvale-Heppenstall Co.*, 421 F.2d 1289 (3rd Cir. 1970) (affirming decision that contract provision recognized principle of equal pay for employees doing equal work with equal ability and providing that "Company agrees to make such adjustments in the present rate or rates for job classifications to achieve the foregoing objective as may be agreed upon by the parties" did not authorize arbitrator to decide and impose upon parties the proper rates to be paid particular employees, but left such determination to *negotiation* by parties); *International Union of Operating Engineers, Local 279* v. *Sid Richardson Carbon Co.*, 471 F.2d 1175 (5th Cir. 1973) (where Employer was granted summary judgment against Union's Complaint for order to arbitrate a representation question where Union sought to have arbitrator exceed prohibition on his adding to, subtracting from or changing the agreement as

written by the parties); and *International Union of Electrical Workers* v. *General Electric Co.*, 407 F.2d 253 (2d Cir. 1968), cert. den. 395 U.S. 904 (1969) (where the Court reversed the District Court's order that certain piecework wage rates be set by an arbitrator where the Union had not filed a grievance claiming a contract violation as required by the arbitration agreement before any duty to arbitrate existed).

This is not a case where an Employer seeks to evade an agreement to arbitrate a claim of contract violation, as was involved in the *American Mfg. Co.* and *Warrior* cases. It is not a case where the Employer insists on an absolute right to determine the issues in question, without consultation or negotiations with the Union. Rather, it is a case where the parties have agreed to negotiate, and the Union has violated its duty to negotiate in good faith by hiding behind the cloaks of the federal courts and behind a false presumption that all disputes which are non-strikeable are *ipso facto* arbitrable.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 2, 1974

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 72-1731

Laundry, Dry Cleaning and Dye House Workers International Union, Local 93, of Springfield, Missouri,

Appellee,

v.

Robert M. Mahoney, Joyce B. Mahoney, Michael Mahoney, Patrick Mahoney, and Jeffrey Mahoney, d/b/a Bormon Investment Company, and Colonial Linen Service,

Appellants.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: November 12, 1973
Filed: January 22, 1974

Before MEHAFFY, Chief Judge, GIBSON, LAY, HEANEY, BRIGHT, ROSS, STEPHENSON and WEBSTER, Circuit Judges, *en banc*.

HEANEY, Circuit Judge, with whom LAY, BRIGHT and WEBSTER, Circuit Judges, join.

This matter comes before the Court *en banc* on a petition for rehearing. The sole issue is whether the trial court erred in requiring the parties to a collective bargaining agreement to submit a mid-contract wage dispute to binding arbitration.[1]

On August 8, 1968, the Union entered into a collective bargaining agreement with the then owner of the business. Article XX of the agreement provides:

> *Section 1.* This agreement shall remain in full force and effect until August 8, 1973, and from year to year thereafter, unless sixty (60) days prior to August 8, 1973, or any year thereafter, the Union notifies the Employer or the Employer notifies the Union of its desire to terminate or modify this Agreement. This notice must be written.
>
> *Section 2.* Either the Employer or the Union shall have the right as of August 8, 1971, to reopen for negotiation on the subject of wages and seniority only, upon either party giving written notice to the other at least sixty (60) days prior to such reopening date. In the absence of such notice, the existing conditions shall continue to remain in effect until the expiration date of the Agreement.

Thereafter, most of the assets of the business were sold to the Bormon Investment Company, and that firm became obligated to abide by the terms of the agreement as a successor employer.

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1. Initially, a divided panel affirmed the District Court holding that the parties were required to submit the dispute to binding arbitration. *Laundry, Dry Cleaning and Dye House Workers International Union, etc. v. Robert M. Mahoney, et al.*, No. 72-1731, filed August 16, 1973 (unpublished).

The Union and the Employer exercised their option to reopen the contract on wages and seniority by giving a timely notice. The parties were unable to reach an agreement on either issue. The Union demanded that the unresolved issues be submitted to arbitration. The Employer refused on the grounds that it was not obligated to arbitrate these issues. The Union then brought an action seeking to require the Employer to submit the dispute to arbitration.

The agreement generally establishes wage rates and working conditions. It specifically provides:

ARTICLE I.

Purpose

Section 1. It is the intent and purpose of the parties hereto, to set forth herein their basic agreement covering wages, hours of work, and conditions of employment to be observed between the parties hereto, and to provide procedures for the prompt, and equitable adjustment of all grievances and disputes arising between the Employer and the Union or any employee or employees covered by this Agreement.

* * *

ARTICLE XIII.

No Strike or Lockout

Section 1. There shall be no strikes, stoppages, slowdowns, or concerted activity interrupting or interfering with production or lockouts, for any reason whatsoever during the life of this Agreement.

It also contains a grievance and arbitration clause which reads as follows:

ARTICLE XIV.

Grievance and Arbitration

Section 1. It is hereby agreed that the Union may have one (1) duly accredited representative to be known as the "Steward" in each plant to be selected by the Union. It shall be his or her duty to receive complaints and to present them to the management. * * *

Section 2. In order to determine the existence and/or validity of a grievance, the Steward shall notify the Plant Manager or his designated representative of the charge by an employee, and as soon as practicable, the Steward and the Employer representative shall discuss the matter with the view of resolving the issue if possible. * * *

Section 3. If the grievance is not settled in the manner set forth in Section 2 within two (2) working days after the Steward has first discussed it with the Plant Manager, it shall be reduced to writing and considered between the Business Agent and Company representatives.

Section 4. If not settled within five (5) working days as set forth in Section 3, the matter shall be referred to arbitration.

Section 5. Each party shall select an arbitrator [.] * * * Should there be no agreement between the two arbitrators as to the third arbitrator, application shall be made to the Federal Mediation and Conciliation Service in Washington, D. C., for a panel of five (5) nominees. The parties shall alternate in striking two names each and the remaining shall be the impartial arbitrator. The arbitrator shall not have the

power to add to, subtract from, or change the terms of the contract. The decision of a majority of the panel shall be final and binding. * * *

* * *

ARTICLE XVIII.

Savings Clause

Section 1. If any law now existing or hereinafter enacted, or any proclamation, regulation, or edict of any state or national agency shall invalidate any portion of this Agreement, the entire Agreement shall not be invalidated, and either party hereto, upon notice to the other, may reopen for negotiation the invalidated portion, and if agreement thereon cannot be reached, within thirty (30) days, either party may submit the matter to arbitration as herein provided.

The matter was submitted to the trial court on cross-motions for summary judgment. The court initially determined that the question of arbitrability was for it to decide. It then held, on the authority of the *United Steel Workers* v. *Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960), that the dispute was arbitrable because no forceful evidence of an intent or purpose to exclude the dispute from arbitration was evidenced.

The Employer argues on appeal: (1) that they are under no obligation to arbitrate any wage and seniority issues; (2) that their only obligation under the agreement is to negotiate on the two issues, and they have fulfilled that obligation; (3) that arbitration is only available to resolve employee grievances, and then only after such grievances have been processed in accordance with Sections 1, 2, 3 and 4 of Article XIV of the agreement; and (4) that, here, no grievance exists, and that the dispute

between the Employer and the Union was not processed in accordance with the above sections.

The trial court correctly held that the issue of arbitrability was one for it to decide. *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964); *Drake Bakeries v. Local 50*, 370 U.S. 254 (1962).

The trial court also properly decided that the mid-term contract dispute between the Employer and the Union over wages and seniority is an arbitrable one.

Warrior teaches:

> The Congress, however, has by §301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. Yet, to be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under §301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or agreed to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.
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> * * *
>
> * * * In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, par-

> ticularly where, as here, the exclusion clause is vague and the arbitration clause quite broad. Since any attempt by a court to infer such a purpose necessarily comprehends the merits, the court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator.

United Steel Workers v. Warrior and Gulf Navigation Co., *supra* at 582, 584-585. *Accord, Local Union No. 4, IBEW, AFL-CIO v. Radio Thirteen-Eighty, Inc.*, 469 F.2d 610 (8th Cir. 1972); *Builders Ass'n of Kansas City v. Greater Kansas City Lab. D. C.*, 326 F.2d 867 (8th Cir.), *cert. denied*, 377 U.S. 917 (1964)[2]

We are convinced, as was the trial court, that it cannot be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute.[3] Although the "Grievance and Ar-

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2. *See*, 85 HARV. L. REV. 636 (1972); Griswold, The Supreme Court 1959 Term, 74 HARV. L. REV. 81, 181 (1960); 59 MICH. L. REV. 454 (1961); 45 MINN. L. REV. 282 (1960); The New Federal Law of Labor Injunctions, 79 YALE L. J. 1593 (1970).

3. In *Hughes Tool Co.*, 36 Lab. Arb. (1960), an arbitrator reached a result generally inconsistent with that reached here. The arbitrator stated:

> Both parties referred in their respective arguments to the recent decisions of the United States Supreme Court in * * * American Manufacturing Co., [and] Warrior * * *. Those cases all dealt, however, with the power of federal courts, rather than with the discretion of arbitrators. Construing those cases in a way most favorable to the Union here involved would lead at most to the conclusion that if the parties had litigated this issue in federal court instead of submitting it to private arbitration, the court would have ruled that the issue was arbitrable; or that, conversely, if the arbitration decision in this case were in favor of arbitrability, the court would decline to vacate it on review.

Id. at 1129.

bitration" clause speaks of employee grievances, the "purpose" clause of the agreement asserts that *the agreement is intended to provide "procedures for the * * * equitable adjustment* of all grievances and *disputes arising between the Employer and the Union* * * *". If the contract is to be read as a whole, as it must, *Montana-Dakota Utilities Co. v. N.L.R.B.*, 455 F.2d 1088 (8th Cir. 1972), effect should be given to this language. The savings clause speaks of submitting matters other than grievances to "arbitration as herein provided," thus negating an intent to limit the arbitration clause in the manner suggested by the appellant. Moreover, the collective bargaining agreement includes an absolute "no strike, no lockout" clause. This inclusion lends support to the view that the collective bargaining agreement was intended to completely effectuate the federal policy of promoting industrial stabilization through collective bargaining.[4]

In summary, we not only fail to find forceful evidence of a purpose to exclude the mid-contract wage dispute from arbitration, but we find evidence of a contrary purpose. The *Warrior* rule is thus triggered.[5]

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4. * * * The present federal policy is to promote industrial stabilization through the collective bargaining agreement. * * *

Complete effectuation of the federal policy is achieved when the agreement contains both an arbitration provision for all unresolved grievances and an absolute prohibition of strikes, the arbitration agreement being the *"quid pro quo"* for the agreement not to strike. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 455.

United Steel Workers v. Warrior and Gulf Navigation Co., 363 U.S. 574, 578 (1960).

5. The following cases are distinguishable on their facts: *West Coast Telephone Co. v. Local U. No. 77, Int. Bro. of Elec. Wkrs.*, 431 F.2d 1219 (9th Cir. 1970); *Federal Labor Union No. 18887 v. Midvale-Heppenstall Co.*, 421 F.2d 1289 (3rd Cir. 1970); *Radio Corp. of Am. v. Association of Scientists & Pro. Eng. P.*, 414 F.28 893 (3rd Cir. 1969). In each case, the collective bargaining agreement made it clear that the issue the Union sought to

(Continued on following page)

Concern has been expressed that the effect of this opinion will be to make mid-term wage disputes in multi-year contracts subject to arbitration whenever a collective bargaining agreement contains an arbitration and a no-strike clause. We find no cause for such concern. The parties to a collective bargaining agreement can, by plain language, exclude such dispute from arbitration. They can lift the "no strike, no lockout" pledge in such circumstances, *see, United Steel Workers v. Warrior and Gulf Navigation Co., supra,* n.5 579, or permit the pledge to remain in effect and require the dispute to be resolved by bargaining or not at all. All that is necessary is that the parties make their intent to exclude arbitration clear. They have not done so here.

We find no merit to the Employer's contention that the judgment against three minor defendants should be set aside because it was imposed on them without the prior appointment of a *guardian ad litem.* The first exception to Rule 17(b), 28 U.S.C., permits a partnership to be sued in its common name for the purpose of enforcing against it a substantive right existing under the laws of the United States. The right to arbitrate is such a right.

Moreover, the trial court properly found that the minors' interests were adequately protected by the presence of their parents as defendants. *See, Westcott v. United States Fidelity and Guaranty Company,* 158 F.2d 20 (4th Cir. 1946); *Rutland, Administrator v. Sikes, et al.,* 203 F.Supp. 276 (E.D. S.C.), *aff'd,* 311 F.2d 538 (4th Cir. 1962), *cert. denied,* 374 U.S. 830 (1963).

Footnote continued—

arbitrate was, in fact, non-arbitrable. *See also, Firestone Tire and Rubber Co. v. International Union, Etc.,* 476 F.2d 603 (5th Cir. 1973); *Ford v. General Electric Co.,* 395 F.2d 157 (7th Cir. 1968).

The judgment below is affirmed by an equally divided court.

WEBSTER, Circuit Judge, Concurring.

I concur in Judge Heaney's opinion on the issue of arbitrability, and in the result. Because Judge Heaney's opinion does not deal with the contractual limitations on the powers of the arbitrator,[1] and because Judge Ross sees this clause as critical to his analysis, I feel obliged to state my views on that subject.

Given the now clearly stated Congressional and judicial policy favoring the use of arbitration (in exchange for a no-strike clause) in the collective bargaining arena, it does not follow that the arbitrator can or will in each case grant the relief sought by the party aggrieved. We do not know, for example, whether the arbitrator will determine that a reopened issue is an exception to the no-strike provision. Thus, he might, under appropriate findings, order the parties to resume bargaining or hold that the union is free to strike absent a resolution of the dispute. Or he may, upon an examination of the contract in the light of the federal labor common law, *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), hold that he is without power to grant certain relief requested by the union.[2]

In *F & M Schaefer Brewing Co. v. Local 49, International Union of United Brewing, etc.*, 420 F.2d 854 (2d

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1. * * * the arbitrator shall not have the power to add to, subtract from, or change the terms of the contract. The decision of a majority of the panel shall be final and binding. * * *

Article XVII, Section 5

2. *See* Note, *Mid-Term Modification of Terms and Conditions of Employment*, Duke L.J. 813, 825-31 (1972).

Cir. 1970), the court reversed the trial court's order staying arbitration. The trial court had held that since the arbitrator was not given the power to fix new rates, submission of the grievance to him would require him to exceed his powers. The Second Circuit disagreed, saying that this question "would go only to the remedy. . . ." 420 F.2d at 856.

> [I]n *Torrington*, we pointed out that the question of the arbitrator's authority to make a particular award was best left to the arbitrator initially, so that the court could receive "the benefit of the arbitrator's interpretative skills as to * * * his contractual authority." 362 F.2d at 680 n.6.[3] Here, we are asked to prevent arbitration in the first place. To do so on the theory that we should not require a useless act misconceives the possibilities open to an arbitrator and ignores the explicit lesson of the Trilogy . . . that "[t]he processing of even frivolous claims may have therapeutic values."

420 F.2d at 856. (footnote added)

In *Tobacco Workers International Union, Local 317 v. Lorillard Corp.*, 448 F.2d 949 (4th Cir. 1971), the Fourth Circuit construed an almost identical contractual limitation in this way:

> The quoted sentence does not, we think, limit the arbitrator's "jurisdiction" over those grievances which are subject to arbitration. It is not a limitation on arbitrability, but is instead merely a limitation on

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3. *Torrington Co. v. Metal Products Workers*, 362 F.2d 677, 680 n.6 (2d Cir. 1966):

> [W]e think more exhaustive review of this question is appropriate after the award has been made than before the award in a suit to compel arbitration. . . .

> the arbitrator's power to fashion an award. Carey v. General Electric Co., 315 F.2d 499 (2d Cir. 1963), cert. denied, 377 U.S. 908 . . . (1964). As such it is inappropriate for a court to decide that such a clause excludes the remedy sought prior to arbitration. It is best to leave this question to the arbitrator initially in order to receive "the benefit of the arbitrator's interpretive skills as to * * * his contractual authority." Torrington Co. v. Metal Products Workers Union Local 1645, 362 F.2d 677, 680 n.6 (2d Cir. 1966).
>
> *Id.* at 955.

And in *International Ass'n of Machinists v. Howmet Corp.*, 466 F.2d 1249 (9th Cir. 1972), the Ninth Circuit said:

> We agree with the Fourth Circuit that a clause limiting the power of the arbitrator to add to, subtract from, or alter the provisions of the agreement does not affect the jurisdiction of the arbitrator, but merely limits his power to fashion an award. Tobacco Workers International Union, Local 317 v. Lorillard Corp., 4 Cir., 1971, 448 F.2d 949, 955.
>
> *Id.* at 1252-53.

The point, it seems to me, is that in the case there is no "clear and unambiguous" evidence of non-arbitrability,[4] and we are bound by the Steelworkers' trilogy in such circumstances to hold the issue arbitrable, as Judge Heaney has well demonstrated. We are not to reach the merits by interpretating the scope of the arbitrator's power to award specific relief, or by drawing an inference of non-arbitrability from a contractual limitation on his power in relation to his duties. The courts will be available to test the

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4. *Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co.*, 298 F.2d 644 (2d Cir. 1962).

lawfulness of the arbitrator's decision in an enforcement proceeding.[5] We need not presently assume that he will abuse his contractual power to resolve disputes, nor should the scope of that power be confused with the arbitrability of the dispute.[6]

ROSS, Circuit Judge, with whom MEHAFFY, Chief Judge, GIBSON and STEPHENSON, Circuit Judges, join.

We accept the statement of the case contained in Judge Heaney's opinion. However, we believe that it is clear from reading the contract as a whole that at the time it was negotiated it was not intended by either party to provide for arbitration of wage disputes arising out of the reopening clause. It is clear from Judge Heaney's opinion that Articles I, XIII, XIV, XVIII, and XX are the clauses he relies upon in his determination that the arbitration clause is susceptible to the interpretation that it covers wage disputes under the reopening clause. We do not read those clauses in the same way.

Article I, the purpose clause, merely indicates that the contract as a whole, shall "provide procedures for the prompt, and equitable adjustment of all grievances and disputes arising between the Employer and the Union or any employee or employees covered by this Agreement." It does not say nor imply, in our opinion, that all disputes shall be submitted to *arbitration*. The contract specifically

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5. *See United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 583, 597 (1960).

6. *See Safeway Stores v. American Bakery & Confectionery Workers International Union, Local 111*, 390 F.2d 79, 81 (5th Cir. 1968): "[T]here may be in these controversies two distinct problems. One is whether the grievance is arbitrable. The other is whether the award of the arbiter is to be enforced. To order arbitration is not to approve in advance all, or for that matter, any thing that the arbiter does."

provides for *negotiation* of wage disputes on reopening in Article XX, and *arbitration* of grievances in Article XIV.

A careful reading of Article XIV, as heretofore set forth, shows clearly that it is a *narrow* arbitration clause limited in its scope to *grievances* between the employees and management. The reference to the Steward in Section 1, conferences between the Steward and the Plant Manager in Section 2, written submittion and consideration by the Business Agent and Company representatives in Section 3, and reference to arbitration if there is no solution after five (5) working days in Sections 4 and 5 make it absolutely clear that the intention of the parties was to provide for arbitration of *employee grievances* and not *wage disputes* on reopening. There is no reference in this clause to a Union Bargaining Committee—only to a Union Steward and Union Business Agent, and if there was any doubt whatsoever that this clause was not intended to apply to wage negotiations, which we do not believe there is, it is laid to rest finally and absolutely by the insertion of this sentence: "The arbitrator shall not have the power to add to, subtract from, or change the terms of the contract."[1]

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1. *See West Coast Telephone Co. v. I.B.E.W., Local 77*, 431 F.2d 1219, 1221 (9th Cir. 1970), where the court held that a wage issue could not be resolved by arbitration because of a similar clause. Judge Heaney's opinion, in footnote 5, indicates that this case can be distinguished on its facts since "the collective bargaining agreement made it clear that the issue the Union sought to arbitrate was, in fact, non-arbitrable." But the reason the court held the wage dispute not to be arbitrable, was the inclusion of just such a clause as is present in this contract. The court stated:

> Thus the company seeks a change in the terms of the written agreement. It can be said with positive assurance that such an issue is not arbitrable under the agreement in question. The arbitration clause of the contract expressly provides that the arbitrator "shall have no power to destroy, change, add to or delete from its terms."
>
> The district court correctly determined that the issues were not arbitrable and that the court should proceed to a consideration of the reformation issues. (Footnote omitted.)

Id. at 1221.

(Continued on following page)

Nothing in Judge Heaney's opinion or in the briefs provides a logical explanation of how an arbitrator can change the wages of the employees of this company without specifically violating this very explicit provision of the Agreement.

Article XVIII, the savings clause, is an express recognition by the parties that the arbitration clause does *not* cover all disputes under the contract. It makes an exception to the narrow scope of arbitration provided in Article XIV and specifically provides for arbitration in cases in which some portion of the Agreement is invalidated by law. The failure of the parties to similarly provide for arbitration of wage disputes on reopening in Article XX, after providing for it specifically for employee grievances and invalidation of a portion of the contract by law, is an additional indication to us that it was not intended to apply to wage disputes on reopening.

It is apparent to us from an examination of the entire contract that the Union, having for some reason failed to reserve the right to strike if wage negotiations on reopening proved fruitless, decided to ask the federal courts to make up for this negotiating deficiency by construing the contract to include wage disputes as an arbitrable matter, in

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Footnote continued—

Judge Webster, in his concurring opinion, and without expressing an opinion as to the legality of *any* change to be ordered by the arbitrator, suggests that the arbitrator may have several options. These include an order to resume bargaining or an order holding "the union is free to strike." Any order permitting the union to strike would violate the no-strike clause which prohibits strikes "for any reason whatsoever" and would be just as much a prohibited change in the terms of the contract as raising the wages set forth therein. The suggestion also is not practical in view of the fact that the contr as due to expire on August 8, 1973. Realistically, the only options open to the arbitrator are to raise wages or let them remain the same and that decision should be made now rather than forcing the parties to possibly go through an enforcement proceedings after the award is made.

direct contravention of the obvious intent of the Agreement.

The only possible valid reason we can perceive for requiring arbitration of this wage dispute is if *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 (1960), and *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960) stand for the proposition that the failure to specifically exclude wage disputes from arbitration in any labor contract automatically makes wage disputes subject to arbitration. We do not believe this was the intent of either case.

The *Steelworkers* cases are often cited for the proposition that the no-strike clause is the quid pro quo for the arbitration clause and *Warrior* is cited for the proposition that arbitration should be required "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Steelworkers v. Warrior & Gulf Co., supra*, 363 U.S. at 582-583. But we should remember that this language must be read in light of the facts of each case and in light of other equally strong language that *"a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."* *Id.* at 582 (emphasis supplied).

American Mfg. Co. involved a grievance filed on behalf of an employee over reemployment rights after a disabling accident. The contract provided that "[a]ny disputes, misunderstandings, differences or grievances arising between the parties as to the meaning, interpretation and application of the provisions of this agreement, which are not adjusted as herein provided, may be submitted to the Board of Arbitration for decision. . . ." The employer relied on a clause which stated as follows:

> The Management of the works, the direction of the working force, plant layout and routine of work, in-

> cluding the right to hire, suspend, transfer, discharge or otherwise discipline any employee for cause, such cause being: infraction of company rules, inefficiency, insubordination, contagious disease harmful to others, and any other ground or reason that would tend to reduce or impair the efficiency of plant operation; and to lay off employees because of lack of work, is reserved to the Company, provided it does not conflict with this agreement. . . .

Steelworkers v. American Mfg. Co., supra, 363 U.S. at 565, n.2.

The normal grievance procedures had been followed prior to suit.

Warrior involved a dispute over the right of the company to subcontract part of its work resulting in a partial reduction in the working force. The arbitration clause of the contract provided in part:

> Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise, there shall be no suspension of work on account of such differences but an earnest effort shall be made to settle such differences immediately in the following manner: . . .

Steelworkers v. Warrior & Gulf Co., supra, 363 U.S. at 576.

The company relied upon a paragraph in the agreement which stated that "[M]atters which are strictly a function of management shall not be subject to arbitration under this section." *Id.* at 588. The normal grievance procedures had been followed prior to suit.

In this case the dispute concerned failure to successfully negotiate increased wages for all employees under a wage reopening clause. The two arbitration clauses contained *no* general language similar to the *Warrior* or *American Mfg. Co.* cases.[2] The language was very specific in referring first to grievances of employees and the presentation of those grievances to management and later to arbitration; and second to the specific question of portions of the contract which might later be invalidated by law. The contract specifically provided that wages on reopening were to be *negotiated* (rather than arbitrated) and the arbitration clause contained a provision prohibiting the arbitrator from adding to, subtracting from or changing the terms of the contract. The specified grievance procedures were *not* followed and after negotiations broke down the union filed its suit to compel arbitration.

This case can be distinguished from *American Mfg. Co.* and *Warrior* in four significant ways: first, in the wording of the arbitration clause; second, in the subject matter of the controversy; third, in the strength and clarity of the clauses relied upon by management to show arbitration was not intended; and, fourth, in the grievance procedures followed in *Warrior* and *American Mfg. Co.* and ignored here. The distinctions are both obvious and significant. In *American Mfg. Co.* and *Warrior* the wording of the arbitration clause was broad. Here it is narrow and specific. In *American Mfg. Co.* and *Warrior* the grievances related to questions which may or may not have been reserved to management in the contract. Certainly in each

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2. The arbitration clause in *American Mfg. Co.* was described by the Court as the "standard form." *Id.* at 565. The fact that the parties in the instant action did not adopt the standard form indicates an intent to depart from the customary industry practices concerning the scope of arbitration clauses which the principles enunciated in *American Mfg. Co.* and *Warrior* characteristically control.

case there was a gray area involved. In this case the dispute related to wages on reopening, a subject traditionally reserved to negotiations.[3] In *Warrior* the employer relied or clauses in which the rights of management were referred to but not specifically defined. In *American Mfg. Co.* the clause relied on by the employer did not really cover the question presented by the arbitration. But by the terms of the agreement in this case the arbitrator was expressly forbidden to *change* any term of the contract. In *Warrior* and *American Mfg. Co.* normal grievance procedures were followed prior to suit. In this case no pretext was made by the union of following the grievance procedures specified in the contract.

These distinctions become especially significant in light of some of the holdings of *Warrior*. First, as heretofore stated, the majority opinion made it clear that the court must first determine whether or not the parties have *contracted* to arbitrate a particular dispute:

> The Congress, however, has by § 301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. *For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.*

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3. We believe that in general, "[d]isputes as to 'rights' are adjudicable under the laws or agreements on which the rights are based, and are readily adaptable to settlement by arbitration. Disputes as to 'interest,' on the other hand, involve questions of policy which, for lack of predetermined standards, are not generally regarded as justiciable or arbitrable." ELKOURI AND ELKOURI, HOW ARBITRATION WORKS (3d ed. 1973). *See also Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711 (1945) for a general discussion concerning the arbitrability of "major" and "minor" disputes, and the different treatment accorded thereto in the railroad industry.

Steelworkers v. Warrior & Gulf Co., supra, 363 U.S. at 582 (emphasis supplied).

This holding, it should be noted, was a predicate for the holding which indicated that doubts should be resolved in favor of coverage. Resolving doubts under a contract is obviously not the same as stating that anything which is not excluded is, by implication, included. In our opinion, there is simply no doubt to be resolved in this case.

Second, the Court in *Warrior* placed special emphasis on the broad arbitration clause in the *Warrior* contract when it said:

> In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, *particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad.*

Id. at 584-585 (emphasis added).

In *American Mfg. Co.*, Justice Brennan, concurring, stated:

> The Court rightly concludes that appropriate regard for the national labor policy and the special factors relevant to the labor arbitral process, admonish that judicial inquiry into the merits of this grievance should be limited to the search for an explicit provision which brings the grievance under the cover of the exclusion clause since *"the exclusion clause is vague and arbitration clause quite broad."*

Steelworkers v. American Mfg. Co., supra, 363 U.S. at 572 (emphasis supplied).

As heretofore indicated, the arbitration clause in this case is very narrow and the exclusion clause is certainly not vague.

Third, in both *Warrior* and *American Mfg. Co.* the Court held that it was not really clear under the contract whether the particular dispute in issue involved a matter specifically reserved to management. It stated in *Warrior*:

> Respondent claims that the contracting out of work falls within this category. Contracting out work is the basis of many grievances; and that type of claim is grist in the mills of the arbitrators.

Steelworkers v. Warrior & Gulf Co., supra, 363 U.S. at 584.

And in *American Mfg. Co.* the Court stated:

> The union claimed in this case that the company had violated a specific provision of the contract. The company took the position that it had not violated that clause. There was, therefore, a dispute between the parties as to "the meaning, interpretation and application" of the collective bargaining agreement.

Steelworkers v. American Mfg. Co., supra, 363 U.S. at 569.

No such interpretation of the contract is possible in this case. The subject of wages is traditionally reserved to negotiation and is not normally subject to arbitration.

Since the Steelworkers' trilogy in 1960,[4] there have

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4. Prior to the Steelworkers' trilogy several cases involving this question were the subject of arbitrators' decisions. In the following cases the fact that a collective bargaining agreement contained a wage reopener did not oblige the parties to agree on wage increases. Thus disputes arising upon impasses in negotiations under a wage reopener were held to be nonarbitrable. *P. P. Williams Co.*, 24 Lab. Arb. 587 (1955); *West Penn Power Co.*, 24 Lab. Arb. 741 (1955); *Air Reduction Sales Co.*, 10 Lab Arb. 528 (1948); *In re Berger*, 9 Lab. Arb. 1048 (1948). Cases taking the opposite view include: *Sacramento Wholesale Bakers Ass'n*, 20 Lab. Arb. 106 (1952); *Lincoln Dairy Co.*, 14 Lab. Arb. 1055 (1950).

been no cases decided in federal courts involving this precise issue that have been called to our attention. However, there have been at least two arbitrator's decisions on cases very similar to this one.

In *Hughes Tool Co.*, 36 Lab. Arb. 1125 (1960) the arbitrator held that the contract could not be construed to require arbitration of wages on reopening in a factual situation similar to this case. In that case the arbitrator placed special emphasis on a clause which provided that an arbitrator could not change or modify any provision of the agreement. In *Hughes Tool Co.* there was also a much broader arbitration clause than is present in this case.

In *Rose-Derry Ohio, Inc.*, 49 Lab. Arb. 40 (1967) the opposite result was reached but great emphasis was placed on the fact that the arbitration clause was very broad providing that "*and* and *all* . . . disputes or controversies . . . including *any* matter relating to *wages* . . . not specifically covered herein, shall be . . . resolved in the following manner." *Rose-Derry Ohio, Inc., supra,* 49 Lab. Arb. at 44 (emphasis supplied). This clause alone serves to distinguish that case from this one.

For these reasons we feel it is clear that this case can be logically distinguished from *Warrior* and *American Mfg. Co.* and believe that the trial court's decision represents an unwarranted extension of the holding of those cases.

One further word seems appropriate about the quid pro quo theory. In our opinion this theory was best described by Justice White in his majority opinion in *Drake Bakeries v. Bakery Workers,* 370 U.S. 254, 261 n.7 (1962) when he stated as follows:

> We do not understand the opinions in *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448, 455, or *United Steelworkers v. American Mfg. Co.,* 363 U.S.

> 564, 567, to enunciate a flat and general rule that these two clauses are properly to be regarded as exact counterweights in every industrial setting, or to justify either party to the contract in wrenching them from their context in the collective agreement on the ground that they are mutually dependent covenants which are severable from the other promises between the parties.

See also Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95, 106 (1962) wherein the Court stated as follows:

> What has been said is not to suggest that a no-strike agreement is to be implied beyond the area which it has been agreed will be exclusively covered by compulsory terminal arbitration. Nor is it to suggest that there may not arise problems in specific cases as to whether compulsory and binding arbitration has been agreed upon, and, if so, as to what disputes have been made arbitrable.

In other words, while the two clauses may be a quid pro quo for each other in a general sense, it does not necessarily mean that the parties cannot limit their application by the terms of the agreement. Often no-strike clauses contain specific exceptions relating to failure to agree upon wages in a wage reopening negotiation. By the same token the contract must be examined to determine what the parties intended to arbitrate and what they did not intend to arbitrate just as Justice Douglas indicated in *Warrior. Steelworkers* v. *Warrior & Gulf Co., supra*, 363 U.S. at 582.

Judge Heaney notes that "[c]oncern has been expressed that the effect of this opinion will be to make mid-term wage disputes in multi-year contracts subject to arbitration wi[illegible]ever a collective bargaining agreement

contains an arbitration and a no-strike clause." He then indicates that the parties can by agreement "exclude such dispute from arbitration." I find no fault with that reasoning but what will the effect be on hundreds of *existing* multi-year labor contracts within this seven-state circuit? Although these opinions by an equally divided Court create no binding precedent for the Eighth Circuit, the argument will certainly be made that arbitration of wage disputes on reopening is a right the union may claim in any case in which the contract includes a no-strike clause and does not specifically prohibit arbitration of wage disputes.

We would reverse with directions to dismiss.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

Judgment

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 72-1731
September Term, 1973

Laundry, Dry Cleaning and Dye House Workers International Union, Local 93 of Springfield, Missouri,
Appellee,

vs.

Robert M. Mahoney, Joyce B. Mahoney, Michael Mahoney, Patrick Mahoney, and Jeffrey Mahoney, d/b/a Bormon Investment Company, American Laundry Company and Colonial Linen Service,
Appellants.

(Filed January 22, 1974)

APPEAL FROM the United States District Court for the Western District of Missouri.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Missouri and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed, in accordance with the opinion of this Court this day filed herein.

January 22, 1974

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 72-1731
September Term, 1973

Laundry, Dry Cleaning and Dye House Workers International Union, Local 93 of Springfield, Missouri,
Appellee,

vs.

Robert M. Mahoney, et al,
Appellants.

Appeal from the United States District Court for the Western District of Missouri

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The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

February 13, 1974

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 72-1731
September Term, 1973

Laundry, Dry Cleaning and Dye House Workers International Union, Local 93 of Springfield, Missouri,
Appellee,

vs.

Robert M. Mahoney, Joyce B. Mahoney, Michael Mahoney, Patrick Mahoney, and Jeffrey Mahoney, d/b/a Bormon Investment Company, American Laundry Company and Colonial Linen Service,
Appellants.

Appeal from the United States District Court for the Western District of Missouri

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On consideration of the motion of appellants for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after March 6, 1974, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

March 6, 1974

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 72-1731

Laundry, Dry Cleaning and Dye House Workers International Union, Local 93 of Springfield, Missouri,
Appellee,

v.

Robert M. Mahoney, Joyce B. Mahoney, Michael Mahoney, Patrick Mahoney, and Jeffrey Mahoney, d/b/a Bormon Investment Company and Colonial Linen Service, Colonial Linen Service,
Appellants.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: April 26, 1973
Filed: August 16, 1973

Before HEANEY, BRIGHT and Ross, Circuit Judges.

HEANEY, Circuit Judge.

The principal issue raised on this appeal is whether the trial court erred in requiring the parties to a collective bargaining agreement to submit a mid-contract wage dispute to binding arbitration.

On August 8, 1968, the Union entered into a collective bargaining agreement with the then owner of the business. Article XX of the agreement provides:

"*Section 1.* This agreement shall remain in full force and effect until August 8, 1973, and from year to year thereafter, unless sixty (60) days prior to August 8, 1973, or any year thereafter, the Union notifies the Employer or the Employer notifies the Union of its desire to terminate or modify this Agreement. This notice must be written.

Section 2. Either the Employer or the Union shall have the right as of August 8, 1971, to reopen for negotiation on the subject of wages and seniority only, upon either party giving written notice to the other at least sixty (60) days prior to such reopening date. In the absence of such notice, the existing conditions shall continue to remain in effect until the expiration date of the Agreement."

Thereafter, most of the assets of the business were sold to the Bormon Investment Company, and that firm became obligated to abide by the terms of the agreement as a successor employer.

The Union and the Employer exercised their option to reopen the contract on wages and seniority by giving a timely notice. The parties were unable to reach an agreement on either issue. The Union demanded that the unresolved issues be submitted to arbitration. The Employer refused on the grounds that it was not obligated to arbitrate these issues. The Union then brought an action seeking to require the Employer to submit the dispute to arbitration.

The agreement generally establishes wage rates and working conditions. It specifically provides:

"ARTICLE I.

"Purpose

"*Section 1.* It is the intent and purpose of the parties hereto, to set forth herein their basic agreement covering wages, hours of work, and conditions of employment to be observed between the parties hereto, and to provide procedures for the prompt, and equitable adjustment of all grievances and disputes arising between the Employer and the Union or any employee or employees covered by this Agreement.

* * *

"ARTICLE XIII.

"No Strike or Lockout

"*Section 1.* There shall be no strikes, stoppages, slowdowns, or concerted activity interrupting or interfering with production, or lockouts, for any reason whatsoever during the life of this Agreement."

It also contains a grievance and arbitration clause which reads as follows:

"ARTICLE XIV.

"Grievance and Arbitration

"*Section 1.* It is hereby agreed that the Union may have one (1) duly accredited representative to be known as the 'Steward' in each plant to be selected by the Union. It shall be his or her duty to receive complaints and to present them to the management. * * *

"*Section 2.* In order to determine the existence and/or validity of a grievance, the Steward shall notify the Plant Manager or his designated representative of the

charge by an employee, and as soon as practicable, the Steward and the Employer representative shall discuss the matter with the view of resolving the issue if possible. * * *

"*Section 3.* If the grievance is not settled in the manner set forth in Section 2 within two (2) working days after the Steward has first discussed it with the Plant Manager, it shall be reduced to writing and considered between the Business Agent and Company representatives.

"*Section 4.* If not settled within five (5) working days as set forth in Section 3, the matter shall be referred to arbitration.

"*Section 5.* Each party shall select an arbitrator [.] * * * Should there be no agreement between the two arbitrators as to the third arbitrator, application shall be made to the Federal Mediation and Conciliation Service in Washington, D. C., for a panel of five (5) nominees. The parties shall alternate in striking two names each and the remaining shall be the impartial arbitrator. The arbitrator shall not have the power to add to, subtract from, or change the terms of the contract. The decision of a majority of the panel shall be final and binding. * * *

* * *

"ARTICLE XVIII.

"Savings Clause

"*Section 1.* If any law now existing or hereinafter enacted, or any proclamation, regulation, or edict of any state or national agency shall invalidate any portion of this Agreement, the entire Agreement shall not be invalidated, and either party hereto, upon

notice to the other, may reopen for negotiation the invalidated portion, and if agreement thereon cannot be reached, within thirty (30) days, either party may submit the matter to arbitration as herein provided."

The matter was submitted to the trial court on cross-motions for summary judgment. The court initially determined that the question of arbitrability was for it to decide. It then held, on the authority of the *United Steel Workers* v. *Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960), that the dispute was arbitrable because no forceful evidence of an intent or purpose to exclude the dispute from arbitration was evidenced.

The Employer argues on appeal: (1) that they are under no obligation to arbitrate any wage and seniority issues; (2) that their only obligation under the agreement is to negotiate on the two issues, and they have fulfilled that obligation; (3) that arbitration is only available to resolve employee grievances, and then only after such grievances have been processed in accordance with Sections 1, 2, 3 and 4 of Article XIV of the agreement; and (4) that, here, no grievance exists, and that the dispute between the Employer and the Union was not processed in accordance with the above sections.

The trial court correctly held that the issue of arbitrability was one for it to decide. *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964); *Drake Bakeries* v. *Local 50*, 370 U.S. 254 (1962). It also properly decided that the mid-term contract dispute between the Employer and the Union over wages and seniority is an arbitrable one.

Warrior teaches:

"The Congress, however, has by §301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has

breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. Yet, to be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under §301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or agreed to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

* * *

"* * * In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad. Since any attempt by a court to infer such a purpose necessarily comprehends the merits, the court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator."

United Steel Workers v. *Warrior and Gulf Navigation Co.*, *supra* at 582, 584-585. Accord, *Local Union No. 4, IBEW, AFL-CIO* v. *Radio Thirteen-Eighty, Inc.*, 469 F.2d 610 (8th Cir. 1972); *Builders Ass'n of Kansas City* v. *Greater Kansas*

City Lab. D. C., 326 F.2d 867 (8th Cir.), *cert. denied*, 377 U.S. 917 (1964).[1]

We are convinced, as was the trial court, that it cannot be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Although the "Grievance and Arbitration" clause speaks of employee grievances, the "Purpose" clause of the agreement asserts that *the agreement is intended to provide "procedures for the * * * equitable adjustment of* all grievances and *disputes arising between the Employer and the Union * * *."* If the contract is to be read as a whole, as it must, *Montana-Dakota Utilities Co.* v. *N.L.R.B.*, 455 F.2d 1088 (8th Cir. 1972), effect should be given to this language. Moreover, the absolute nature of the "No Strike" clause is an added reason for interpreting the agreement to require arbitration of the dispute. *United Steel Workers* v. *Warrior and Gulf Navigation Co., supra; Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957). Finally, the "Savings Clause" speaks of submitting matters other than grievances to "arbitration as herein provided," thus evidencing some intent that matters other than grievances are to be submitted to arbitration.

In summary, there is sufficient ambiguity in this argument to trigger the *Warrior* rule.[2]

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1. See, 85 HARV. L. REV. 636 (1972); Griswold, The Supreme Court 1959 Term, 74 HARV. L. REV. 81, 181 (1960); 59 MICH. L. REV. 454 (1961); 45 MINN. L. REV. 282 (1960); The New Federal Law of Labor Injunctions, 79 YALE L. J. 1593 (1970).

2. The following cases cited by the Employer are distinguishable on their facts: *West Coast Telephone Co.* v. *Local U. No. 77, Int. Bro. of Elec. Wkrs.*, 431 F.2d 1219 (9th Cir. 1970); *Federal Labor Union No. 18887* v. *Midvale-Heppenstall Co.*, 421 F.2d 1289 (3rd Cir. 1970); *Radio Corp. of Am.* v. *Association of Scientists & Pro. Eng. P.*, 414 F.2d 893 (3rd Cir. 1969). In each case, the collective bargaining agreement made it clear that the issue the Union sought to arbitrate was, in fact, non-arbitrable. See also, *Firestone Tire and Rubber Co.* v. *International Union, Etc.*, 476 F.2d 603 (5th Cir. 1973); *Ford* v. *General Electric Co.*, 395 F.2d 157 (7th Cir. 1968).

We recognize that the Employer's arguments that the dispute is not arbitrable are not without merit. The "Arbitration" clause directs its attention to a three-step procedure for the adjustment of employee grievances and does not specifically state that it is intended to resolve disputes between the Employer and the Union, but the clause cannot be read in isolation from the other sections of the agreement. The "Arbitration" clause also states that "the arbitrator shall not have the power to * * * change the terms of the contract." But, we do not believe that this restriction is applicable where the agreement is reopened pursuant to its terms on the issues of wages and seniority, particularly as the "Purpose" clause states that the parties intend that all disputes be resolved promptly and equitably. Finally, the "Termination" clause speaks of the right of either the Employer or the Union to reopen the contract for negotiations on the subject of wages and seniority, and does not expressly require the parties to submit disputes arising out of the negotiations to arbitration. Yet, it fails to exclude such disputes from arbitration, and we read *Warrior* as requiring exclusionary language where the agreement can otherwise be read as expressing an intent that all disputes be submitted to arbitration.

We find no merit to the Employer's contention that the judgment against three minor defendants should be set aside because it was imposed on them without the prior appointment of a *guardian ad litem*. The first exception to Rule 17(b), 28 U.S.C., permits a partnership to be sued in its common name for the purpose of enforcing against it a substantive right existing under the laws of the United States. The right to arbitrate is such a right.

Moreover, the trial court properly found that the minors interests were adequately protected by the presence of their parents as defendants. See, *Westcott* v. *United States Fidelity and Guaranty Company*, 158 F.2d 20 (4th

Cir. 1946); *Rutland, Administrator* v. *Sikes, et al.*, 203 F. Supp. 276 (E.D. S.C.), *aff'd*, 311 F.2d 538 (4th Cir. 1962), *cert. denied*, 374 U.S. 830 (1963).

Affirmed.

Ross, Circuit Judge, dissenting.

I find no fault with the majority's explication of the law in this case, but I consider its application of that law to the facts to be erroneous. In my opinion, it is clear from a reading of the contract as a whole that the agreement was not intended to provide for arbitration of wage disputes arising out of the reopening clause.

ARTICLE XX governs the procedures to be followed in reopening negotiations on the subjects of wages and seniority only. ARTICLE XIV provides the machinery for resolving grievances and does so in terms which strongly suggest that the grievances intended to be arbitrated are those between the company and *individual* employees with the assistance of the steward. It provides that the steward shall receive and present the complaints to management and also provides for the possibility of the steward and the employer resolving the issue between themselves. If it is not settled within two days, then it is reduced to writing and "considered between the Business Agent and Company representatives." Then if not settled within five (5) working days, it is referred to arbitration. None of these terms nor anything else contained in ARTICLE XIV is consistent with the normal wage renegotiation procedure contemplated by ARTICLE XX.

ARTICLE XVIII provides for arbitration in the event of the invalidation by law of any portion of the agreement and the failure of the parties to renegotiate the invalidated clause within thirty (30) days. This shows clearly the in-

tent of the parties to provide for arbitration in a limited sector other than individual grievances. The failure of the parties to provide for arbitration in a wage reopening context in this paragraph is an indication of their determination to limit the use of arbitration to the general areas specifically mentioned in the agreement.

It is worthy of note that ARTICLE XIV, *Section 5*, provides that the arbitrator "shall not have the power to add to, subtract from, or change the terms of the contract." The decision of the majority permits the arbitrator to *change* the most significant terms of the agreement between the parties, a right which the parties themselves reserved to negotiation rather than to arbitration.

In *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) the Supreme Court had before it a case in which the union claimed that the subcontracting of work to another company amounted to a lockout, which was forbidden by the terms of the labor agreement. It specifically held that there was "a dispute 'as to the meaning and application of the provisions of this Agreement' which the parties had agreed would be determined by arbitration." *Id.* at 585. It further indicated that "[c]ontracting out work is the basis of many grievances; and that type of claim is grist in the mills of the arbitrators." *Id.* at 584. As I view it in *Warrior*, there was evidence that the general subject of "contracting out" was intended to be a part of the agreement. Here there is ample evidence that not only were wages and seniority not arbitrable after an unsuccessful reopening, but indeed the problems relating thereto couldn't even be correctly classified as grievances under the agreement.

Builders Ass'n of Kansas City v. *Greater Kansas City Lab. D. C.*, 326 F.2d 867 (8th Cir.), *cert. denied*, 377 U.S. 917 (1964) is likewise distinguishable. In that case the

arbitration clause was much broader and the dispute resulted from the failure of the employers' association and union to conform to their undertaking to agree upon a trust agreement relating to health and welfare insurance. The cost of the plan was not in dispute. In other words, the arbitrator was called upon to interpret what had already been agreed upon in principle and in cost to the company. In this case, the majority is extending this rule to permit an arbitrator to set new wage rates for the balance of the term of the agreement in spite of the fact that neither party has obligated itself to agree to lowering or raising wages during such term.

I would reverse with directions to dismiss.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION

Civil Action No. 2831

LAUNDRY, DRY CLEANING AND DYE HOUSE WORKERS INTERNATIONAL UNION, LOCAL NO. 93 OF SPRINGFIELD, MISSOURI,

Plaintiff,

vs.

ROBERT M. MAHONEY, et al.,

Defendants.

Memorandum and Order Granting Plaintiff's Motion for Summary Judgment, Denying Defendants' Motion for Summary Judgment, and Directing Parties to Submit Dispute to Arbitration

(Filed September 11, 1972)

This action is brought under Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185. Presently pending before the Court are the cross-motions of the parties for summary judgment. At a pretrial conference, on August 7, 1972, the parties agreed that there are no disputed issues of fact and that this cause may be determined on the basis of the record before the Court without hearing.

The claim herein, in effect, seeks an order enforcing arbitration of dispute arising out of a collective bargaining agreement. The agreement (Exhibit A, attached to the complaint) provides in Article XX, Section 1, that it "shall remain in full force and effect until August 8, 1973." Un-

der Section 2 of Article XX, the parties have the right "to reopen for negotiation" the subjects of "wages and seniority only" as of August 8, 1971. The option provided for in Article XX, Section 2, was exercised by the parties and negotiations on both wages and seniority were had. However, no agreement has been reached in regard to the issue of wages. Plaintiff contends that the agreement provides that binding arbitration is the means of resolving the dispute. Defendant, however, contends that the reopening clause provides only for negotiation and not for arbitration, and that there is no provision for arbitration of such disputes contained in the agreement.

The pertinent provisions of the collective bargaining agreement are as follows:

ARTICLE I.

Purpose

Section 1. It is the intent and purpose of the parties hereto, to set forth herein their basic agreement covering wages, hours of work, and conditions of employment to be observed between the parties hereto, and to provide procedures for the prompt, and equitable adjustment of all grievances and disputes arising between the Employer and the Union or any employee or employees covered by this Agreement.

ARTICLE XIII.

No Strike or Lockout

Section 1. There shall be no strikes, stoppages, slowdowns, or concerted activity interrupting or interfering with production, or lockouts, for any reason whatsoever during the life of this Agreement.

ARTICLE XIV.

Grievance and Arbitration

Section 5. Each party shall select an arbitrator; the Union shall be represented by an International Representative, and the Employer by its labor counsel. Should there be no agreement between the two arbitrators as to the third arbitrator, application shall be made to the Federal Mediation and Conciliation Service in Washington, D.C., for a panel of five (5) nominees. The parties shall alternate in striking two names each and the remaining shall be the impartial arbitrator. The arbitrator shall not have the power to add to, subtract from, or change the terms of the contract. The decision of a majority of the panel shall be final and binding. Each party shall bear the expense of its arbitrator; the expenses of the impartial arbitrator shall be shared equally by the parties.

ARTICLE XX.

Termination

Section 1. This agreement shall remain in full force and effect until August 8, 1973, and from year to year thereafter, unless sixty (60) days prior to August 8, 1973, or any year thereafter, the Union notifies the Employer or the Employer notifies the Union of its desire to terminate or modify this Agreement. This notice must be written.

Section 2. Either the Employer or the Union shall have the right as of August 8, 1971, to reopen for negotiation on the subject of wages and seniority only, upon either party giving written notice to the other at least sixty (60) days prior to such reopening date. In the absence of such notice, the existing conditions shall

continue to remain in effect until the expiration date of the Agreement.

The contract does not define grievances, disputes or arbitration in any other way than that set out above. Not since the *Steelworkers* trilogy has there been any question that federal labor policy favors the arbitration of disputes. See *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564; *United Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574; *United Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593.

In *American Mfg. Co., supra*, at 567, 568, the court held that if arbitration is provided for by the parties themselves, "the function of the court is very limited" and "is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract." In a concurring opinion, Justice Brennan stated "since arbitration is a creature of contract, a court must always inquire, when a party seeks to invoke its aid to force a reluctant party to the arbitration table, whether the parties have agreed to arbitrate the particular dispute" and that "the question of whether a dispute is 'arbitrable' is inescapably for the court."

The majority opinion in *Warrior, supra*, is of the same tenor as Justice Brennan's concurring opinion in *American* as to the function and scope of the judicial inquiry that is to be made in an action to enforce an arbitration agreement, holding that since "arbitration is a matter of contract . . . a party cannot be required to submit to arbitration any dispute which he has not so agreed to submit." *Warrior* was explicit in establishing the standards of judgment to be applied and followed in cases of this nature, holding:

> Yet, to be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under §

> 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

And, more specifically:

> Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement.

And:

> In the absence of any express provision excluding particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail. . . ."

Warrior, supra, at 1352, 1353.

In Greater Kansas City Laborers District Council of the International Hod Carriers, Building and Common Laborers Union of America of Greater Kansas City and Vicinity v. *Builders' Association of Kansas City,* (W.D. Mo.) 213 F. Supp. 429, aff'd 326 F. 2d 867, *cert. den.* 377 U.S. 917, Judge Oliver summarized the scope of judicial inquiry as established by the *Steelworkers* trilogy as follows at 433:

> Stated simply, our judicial inquiry is "strictly confined" by Congress and the Supreme Court to an examination of the parties' complete intent and our de-

termination of that question is to be aided by our resolution of doubt in favor of coverage, particularly when it can not be said with "positive assurance that the arbitration clause is not susceptible of an interpretation" of coverage and particularly when the parties have not "specifically excluded" the arbitration of the particular difference involved. In the latter situation "only the most forceful evidence of a purpose to exclude" must be present before we can deny coverage.

The agreement herein does not by its own terms limit what disputes or grievances are to be submitted to arbitration. Article I of the Agreement states that the intent of the agreement is to provide procedures for the "prompt and equitable adjustment of all grievances and disputes arising between the Employer and the Union." Therefore, the contract must be looked to for the procedures to be supplied for such "prompt and equitable adjustment." The arbitration clause, Article XIV, Section 5, is the only avenue available, since Article XIII specifically prohibits strikes or lockouts.

Defendant claims that Article XIV, Section 5, prohibits arbitration of this matter for the reason that it contains the provision that "the arbitrator shall not have the power to add to, subtract from, or change the terms of the contract." Therefore, defendant contends, "it is clear that an arbitrator could not set any new wage rates or provide for any new seniority provisions." Moreover, defendant states that merely because wages and seniority are subject to negotiation and/or revision does not make such issues amenable to arbitration.

Article XX, Section 2, however, recognizes that once the issues of wages and seniority are reopened, the re-

opened provisions of the contract are no longer part of the contract terms, since it states that "In the absence of such notice, the existing conditions shall continue to remain in effect until the expiration date of the Agreement."

More importantly, to deny arbitration of wage and seniority dispute where negotiation has failed, would leave the parties with no avenue of relief, and the wage and seniority provisions of the contract would be lacking. In a similar situation, Judge Oliver stated:

> And what must be said as to the intention of the parties in the event differences arose between them as to the exact terms of the Trust Agreement? Certainly neither party can now say that the provisions of the arbitration clause would not come immediately into play. How else can the problem ever be settled? And settled it must be if the policy of the Congress in regard to arbitration clauses in collective bargaining agreements is carried out in accordance with the law of the land as declared by the Supreme Court of the United States in the cases we have cited.

Greater Kansas City Laborers' District v. *Builders' Association, supra,* at 434.

The significance of the "no strike, no lock-out" provision of the agreement cannot be overlooked. In *Textile Workers Union of America* v. *Lincoln Mills of Alabama,* 353 U.S. 448, the court held at 453:

> Congress was also interested in promoting collective bargaining that ended with agreements not to strike. . . .

And at 455:

> Plainly the agreement to arbitrate grievance disputes is *quid pro quo* for an agreement not to strike.

Further, in *American Mfg. Co., supra*, at 567, the court stated, "There is no exception in the 'no strike' clause and none therefore should be read into the grievance clause, since one is *quid pro quo* for the other. . . . Arbitration is the stabilizing influence only as it serves as a vehicle for handling every and all disputes that arise under the agreement."

Since there is no limit upon the disputes covered by the Agreement (Article I), the only procedure provided for adjustment is arbitration, since Article XIII eliminates the possibility of a strike or lockout to enforce demands. The provision eliminating strikes and lockouts (Article XIII), immediately precedes the grievance and arbitration provisions (Article XIV). Thus, since Article I provides that the contract provides procedures for the adjustment of all disputes, the proximity of the two provisions is important in determining the intent of the parties. It appears from the Agreement itself that the "no strike" clause was intended as a *quid pro quo* for the grievance and arbitration provision.

The affidavits of the parties in support of their cross-motions for summary judgment do not establish that there was an agreement that these issues—wages and seniority under Article XX, Section 2—were not to be submitted to arbitration in the event of a dispute. Nor does Article XX, Section 2, provide that such issues are not to be presented to arbitration. "Undoubtedly the parties to the collective bargaining agreement could have excluded from the arbitration clause any and all disputes . . . but they did not do so." *Builders Association of Kansas City* v. *Greater Kansas City Laborers' District Council of the International Hod Carriers, Building and Common Laborers Union of America of Greater Kansas City and Vicinity*, (C.A. 8) 326 F. 2d 867, 869. The mere fact that Article

XX, Section 2, provides specifically for "negotiation" does not preclude arbitration when negotiation fails. See the concurring opinion of Justice Brennan in *American Mfg. Co., supra,* at 570.

The Court finds on the basis of the evidence before us that neither by express agreement nor by necessary implication is the dispute herein one excluded from arbitration. In the absence of any express provision excluding arbitration of this dispute, and with a lack of "forceful evidence of a purpose to exclude the claim from arbitration" [*Warrior, supra,* at 1353] and in light of the foregoing discussion, this Court concludes that there is no real doubt that the arbitration clause is broad enough to cover this dispute.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment be granted and defendants' motion for summary judgment be denied; and

ORDERED that the parties, in accordance with their agreement, proceed to arbitration of the grievances involved in this case

/s/ William Collinson
District Judge